Chapter 3 Section A FISCAL LAW, FUNDING and The ANTI-DEFICIENCY ACT

There Is No Authority To Spend Federal Appropriations Without Specific Statutory Authority.

Section A: Constitutional Foundation

Excerpted from the Office of the General Counsel, Fiscal Law Course

I. CONSTITUTIONAL FOUNDATION

A. The Congressional Powers of the Purse

1. Congress has the power to raise revenue and borrow money. ***U.S. Constitution, Article I, Section 8, Clause 1 - 2.***

2. Congress has the power to raise and support armies and a navy. ***U.S. Constitution, Article I, Section 8, Clause 12 - 13.***

3. No money shall be drawn from the Treasury, but in consequence of appropriations made by law. ***U.S. Constitution, Article I, Section 9, Clause 7.***

4. A regular statement and account of all receipts and expenditures of public money shall be published from time to time. ***U.S. Constitution, Article I, Section 9, Clause 7.***

5. No appropriation for the support of armies shall be for longer than 2 years. ***U.S. Constitution, Article I, Section 8, Clause 12.***

6. Congress's power of the purse is extremely broad. Congress may limit a recipient's use of federal appropriations to those purposes it chooses to subsidize. ***Rust v. Sullivan, 500 U.S. 173, 11 S.Ct. 1759, 114 L.Ed. 2d. 233 (1991).***

B. The President's Powers Are Limited**. [The President] shall take care that the laws be faithfully executed.** ***U.S. Constitution, Article II, Section 3.***

II. THE APPROPRIATIONS PROCESS

A. President's Budget**.** ***Title 31, United States Code, Chapter 11.***

1. The President must submit a consolidated budget to the Congress during the first 15 days of each regular session of Congress. ***31 U.S.C. § 1105.*** **The contents of the budget are specified by law.**

2. The data contained in the budget is developed by individual agencies. ***31 U.S.C. § 1108.*** **In the Department of Defense (DoD), the Programming, Planning, and Budget System (PPBS) regulates the development of the DoD Budget.**

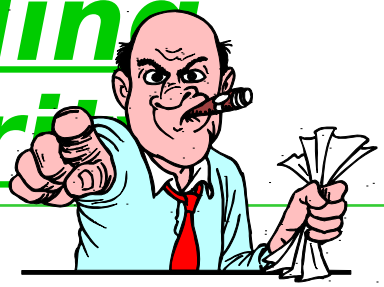
B. Enacting Appropriations

ANTI-DEFICIENCY ACT

Legislation designed to prevent obligations in excess of funds made available:

1. Appropriations and/or **Authorization**

2. Funding Authority



To avoid violations, think TAP

Time: Using funds of the right FY?

Amount: Enough money to pay for it?

Purpose: Spending in accordance with the purpose of the funds?

FIGURE 5

3. Authorization Process

(a) Authorizing committees draft the legislation authorizing Congress to appropriate funds for various agencies and programs. For the DoD, the authorizing committee is the National Security Committee of the House of Representatives.

(b) After receipt of the President's Budget, the authorizing committees hold hearings. After the completion of hearings, they mark-up draft legislation, which is then reported to the House or Senate for action. After each house has passed its own version of the authorizing legislation, a conference committee meets to work out differences in the two versions of the bill. The compromise version of the authorizing legislation is then reported to the two houses for final action and transmittal to the President for signature or veto.

(c) Many DoD Appropriations can not be legally obligated unless authorized. *10 U.S.C. § 114(a).* Authorizing legislation does not allow funds to be withdrawn from the Treasury.

(4) Appropriations Process

(a) The House and Senate Appropriations Committees draft the legislation which actually appropriates funds from the Treasury.

(b) The appropriations committees follow the same process as that followed by the authorizing committees regarding hearings, mark-up, reporting, conference committees on the two versions, and reporting the final compromise version for passage by both houses.

(c) The appropriations acts often contain spending provisions which are written in general language, but directed at specific expenditures.

C. Presentment to the President**.**

All authorization and appropriations acts must be presented to the President for signature or veto. *U.S. Constitution, Article I, Section 7.*

Obligation Authority**.**

1. The annual authorization and appropriations acts generally provide Budget Authority, the authority to incur a legal obligation to pay a sum of money from the *U.S. Treasury. 31 U.S.C. § 1511*. Occasionally, an appropriations act will provide

B. OMB Apportionment

1. Appropriations Acts, Office of Management and Budget (OMB) apportions the budget authority to the agencies. Apportionment is a distribution of budget authority by OMB that imposes limitations on the amount of obligations allowed during a given period under an appropriation. *31 U.S.C. § 1512; DFAS 37-1*, Glossary, Section II, Terms.

2. Apportionments divide the amounts available for obligation by specific time periods (usually quarters), activities, functions, projects, objects, or by a combination thereof. *31 U.S.C. § 1512.*

a. In apportioning an account, funds may be reserved to provide for contingencies or to effect cost savings.

b. An apportionment is considered a formal subdivision of budget authority.

c. OMB apportions budget authority in an effort to control outlays.

C. Agency Fund Distributions

1. Upon receiving its apportionment from OMB, DoD apportions its budget authority to the military departments and defense agencies.

a. Within the DoD, formal subdivisions of funds are established at the highest practical level. R. Dahoney, "DoD, 2 Want An Allowance (A Better Way to Control Funds)", (Resource Management, February 1988), pg. 19.

b. Army policy establishes formal subdivisions of funds at the Major Command level. *DFAS 37-1, para. 6-16.*

2. Agency Allocations/Allotments

a. An allocation is a distribution of budget authority by a agency (DoD/DA) to an operating agency making amounts available for obligations in prescribed amounts for suballocation or allotment to its subordinate activities. *DFAS 37-1, Glossary, Section II, Terms.*

b. Amounts transferred by an allocation must be used to carry out the purposes of the parent appropriation.

c. An allocation is a formal subdivision of budget authority.

3. MACOM Allowance/Target

IV. THE ACCOUNTING SYSTEM.

A. General Principles

1. Executive agencies are required to establish administrative systems to ensure that obligations and expenditures of appropriated funds do not exceed the amount appropriated, apportioned, or reapportioned. *31 U.S.C. § 1514(a)(1).*

2. The fund control system must enable the agency head to fix responsibility for an obligation that exceeds an appropriation or apportionment. *31 U.S.C. § 1514(a)(2).*

3. Formal administrative subdivisions of funds should be established at the highest practical level. *31 U.S.C. § 1514(b).*

4. The structure of the fund control system is determined by the agency.

5. Within the DoD, ***DoD Manual 7220.9-M*** **provides the regulatory framework for the services' fund control systems.**

a. Army Regulation *(DFAS-IN) 37-1* provides additional details on the Army's accounting system.

b. Air Force Regulations *(AFR) 170-6* and 170-8 provide additional guidance for the Air Force.

B. Accounting Classifications.

1. Accounting Classifications are codes used to manage appropriations. They are used to implement the administrative fund control system and aid in ensuring that funds are used correctly.

2. An accounting classification is commonly referred to as a fund cite. *DFAS-IN Manual 37- 100-XX* provides a detailed breakdown of Army accounting classifications. The XX, in DFAS-IN Manual *37-100-XX*, stands for the last two digits of the fiscal year. (e.g., DFAS 37- 100-00 is the source of accounting classification data for Fiscal Year 2000 for the Department of the Army). Beginning in FY97 *DFAS-IN Manual 37-100-XX* will be available only electronically.

FIGURE 6

C. Understanding an Accounting Classification.

1. The following is a sample fund cite: 21 0 2020 67 1234 SEE CROSSWALK 2610 S18001 =

b. Other Department codes are:

(1) 17 - Navy

(2) 57 - Air Force

(3) 97 - Department of Defense

c. The third digit shows the Fiscal Year/Availability of the appropriation. The "0" in the example shown represents Fiscal Year (FY) 2000 funds.

(1) Annual appropriations are frequently used in installation contracting. Several examples of annual appropriations are set forth below:

(a) Third Digit = 5 = FY 1995 funds;

(b) Third Digit = 6 = FY 1996 funds;

(c) Third Digit = 7 = FY 1997 funds; and

(d) Third Digit = 8 = FY 1998 funds.

(e) Third Digit = 9 = FY 1999 funds.

(2) Several other fiscal year designators, less frequently encountered in installation contracting, are:

(a) Third Digit = X = No Year appropriation, which is available for obligation indefinitely.

(b) Third Digit = 8/2 = Multi-Year appropriation, in this example, funds appropriated in Fiscal Year 1998 and available for obligation until Fiscal Year 2002.

d. The next four digits reveal the type of appropriation. Common DoD designators are:

ARMY	NAVY/MC	AIR FORCE	OSD
Military Personnel			
2010	1453/1105	3500	N/A
Reserve Personnel			
2070	1405/1108	3700	N/A
National Guard Personnel			
2060	N/A	N/A	N/A
O&M			
2020	1804/1106	3400	0100
O&M Reserve			
2080	1806/1107	3740	N/A
O&M National Guard			
2065	N/A	N/A	N/A
O&M Family Housing			
7025	7035	7045	
Procurement (Aircraft)			
2031	1506	3010	N/A
Procurement (Missiles)			

FIGURE 7

V. EXECUTION OF BUDGET AUTHORITY

A. Individual Activities Manage the Budget Authority Distributed to Them.

1. The principal management tool is commitment accounting. A commitment is an administrative reservation of funds based on a document authorizing an obligation. ***DFAS-IN Regulation 37-1, para. 8-1.***

2. Different agencies use different forms to authorize obligations and to commit funds.
Within the Department of Army, a DA 3953 is used for this purpose in the absence of an activity specific form.

3. Agency fund managers may also provide budgetary data (initiations) for planning purposes on identical or similar forms.

B. Commitment of Funds

1. After budget authority has been distributed to the activity and activity management has approved a particular use of a particular amount of this budget authority, the financial manager certifies fund availability and reserves an amount equal to the estimated amount of the obligation. ***DFAS 37-1, para. 8-4.***

2. Improperly authorizing obligations may violate statutory fiscal controls.

C. Obligation of Funds

1. When an event occurs which results in a legal liability to disburse funds from the Treasury, either immediately or in the future, an obligation arises.

2. Obligations must be supported by documentary evidence. ***31 U.S.C. § 1501(a).***

3. Financial managers must promptly record obligations. ***DFAS 37-1, para. 9-7.***

D. Expenditure and Recoveries of Funds.

1. After an agency incurs an obligation, it generally will liquidate the obligation by paying funds from the Treasury. Such transactions are called expenditures, outlays, or disbursements. These terms are used interchangeably. ***DFAS 37-1, Glossary, Section II.***

2. Alternatively, some future event may reduce the amount of the government's legal liability to pay. In such instances, the amount recorded as the obligation is adjusted. These adjustments are called recoveries (formerly deobligations). ***DFAS 37-1, Glossary, Section II.***

C. Amount.

There must be an available appropriation to support every obligation or expenditure. 31 *U.S.C. §§ 1341, 1342, 1511-1519.*

VII. CURRENT FISCAL ISSUES.

A. The Deficit: Revenues v. Outlays.

1. The deficit is the difference between outlays and revenues. It is funded by increased borrowings.

2. Closing this gap by increasing revenues requires increasing taxes.

3. Closing this gap by decreasing outlays is difficult because Congress does not directly legislate outlays. Outlays are a combination of expenditures due to previously enacted appropriations and expenditures resulting from new appropriations.

B. The Budget Agreement**.**

1. In 1990, the President and Congress reached a budget agreement which set outlay ceilings for broad budget categories for five years.

2. This agreement effectively reduced the role of the Budget Committees in the appropriations process.

3. Every new program requires an offsetting reduction in outlays or increase in revenues.

C. Use of Expired Accounts**.**

Section B: Purpose

I. CONSTITUTIONAL FOUNDATION

1. *Article I, Section 8, Clause I.* Congress has the power to tax and spend.

2. *Article I, Section 9, Clause 7.* No money shall be drawn from the Treasury, but in consequence of appropriations made by law.

II. STATUTORY FOUNDATION

1. *31 U.S.C. § 1301(a). Purpose statute.*

2. *10 U.S.C. § 2805. Minor military* construction.

3. *10 U.S.C. § 114(a). Authorizations required*

III. REGULATORY FOUNDATION

1. ***DFAS 37-100-FY***

2. ***AR 37-47***

IV. STATUTORY FRAMEWORK

A. PURPOSE OF EXPENDITURE MUST BE PROPER

1. "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." *31 U.S.C. § 1301(a).*

2. Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

3. As an appropriation must be derived from an act of Congress, it is up to Congress to determine the purpose for which an appropriation may be used.

B. STATEMENT OF PURPOSE

1. Appropriations acts are of paramount importance in determining purpose.

a. Appropriations are differentiated by service (Army, Navy, etc.), component (Active, National Guard, etc.), and purpose (Operation and Maintenance, Procurement, etc.).

b. Types of appropriations:

(1) Defense Appropriations Act

(a) Military Personnel - Pay for personal needs. Examples: subsistence, initial clothing issue, pay, quarters allowance, PCS travel.

(b) Operation and Maintenance (O&M) - Pay for day-to-day operations. Examples: pay and benefits of civilian employees, awards, contractual services, utilities, maintenance (recurrent work to prevent deterioration), repair (overhaul, reprocessing, or replacement to reverse deterioration), TDY travel, supplies, paper, cleaning materials, repair parts for all equipment, office machines (under $100,000), and many (TDA) and (TO&E) items.

(c) Procurement - Purchase TO&E, high-dollar value, mission-essential, tactical items, which are intensively managed. Examples: tanks, jeeps, sedans, weapons, rifles, ammo, artillery, missiles, gun tubes, etc.

(c) Projects of $1.5 million or less may be done from Military Construction Appropriations although not specified in the act.

(d) Projects of $500,000 or less may be done from Operation and Maintenance funds in the Defense Appropriations Act. *10 U.S.C. § 2805(c)(1)(B).*

2. Authorization acts usually accompany appropriations acts and may include clarifying language.

a. Appropriations for certain purposes (aircraft, vessels, missiles, research and development) require separate statutory authorization. *10 U.S.C. § 114(a).*

b. When funds are authorized and appropriated with different limitations, the more restrictive limitation controls.

3. Legislative History is the record of congressional deliberations on a bill.

a. Legislative History consists of:

(1) Conference Report

(2) Committee Reports

(3) Floor debate

(4) Hearings

b. Legislative History is not necessarily binding on the Executive Branch.

c. When statutory language is clear, there is no need to resort to legislative history to determine congressional intent. LTV Aerospace Corp., *55 Comp. Gen. 307 (1975), 75-2 CPD para. 203.*

d. When statutory language is not clear, or would have an absurd result, legislative history should be consulted to determine congressional intent. Federal Aviation Administration--Permanent Improvements to Leasehold, *69 Comp. Gen. 673 (1990).*

4. The President's budget and the budget justifications contain detailed descriptions of the purpose proposed for the requested appropriations. The budget contains computer tables showing where funds are to be spent called P-1 and R-1 documents.

C. FUNDING CITATION

1. Identifies the source of funds intended for a particular use.

4. The Appropriation Symbol is the most important part of the funding cite.

a. The first two digits reveal the military department.

(1) 21 - Army

(2) 17 - Navy

(3) 57 - Air Force

(4) 97 - Department of Defense

b. The third digit reveals the fiscal year.

(1) 0-9

(2) X - No year

c. The next four digits reveal the type of appropriation.

(1) 2010 - Military Personnel, Army

(2) 2020 - Operation and Maintenance, Army

(3) 2050 - Military Construction, Army

V. DETERMINING THE PROPER PURPOSE

A. TEST FOR A PROPER PURPOSE

Secretary of the Interior, *34 Comp. Gen. 195 (1954).*

1. The appropriation is made for a particular purpose or the expenditure is necessary and incident to the general purpose.

2. The expenditure is not prohibited by law.

3. The expenditure is not otherwise provided for, that is, does not fall within the scope of some other appropriation.

B. THE NECESSARY EXPENSE RULE

1. "...(T)he standard for measuring the propriety of a particular expenditure not specified in the statute is the "necessary expense" test traditionally used in determining purpose availability under *31 U.S.C. § 1301(a).* Under this test, an expenditure is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and if it is not otherwise prohibited by law."

Internal Revenue Service Federal Credit Union--Provision of Automatic Teller Machine, *66 Comp. Gen. 356 (1987).*

a. Every item of expenditure need not be specified in an appropriation act. The spending agency has reasonable discretion in determining how to carry out the purpose of an appropriation. Department of the Army--Purchase of Commercial Calendars, *62 Comp.*

2. A necessary expense does not have to be the only way or even the best way to achieve the purpose of the appropriation. Secretary of the Interior, *34 Comp. Gen. 599 (1955).* It must, however, be more than merely desirable or important. Secretary of Commerce, *B-42439, July 8, 1944 (unpub.).* Usually, it is in direct support of the agency's mission. *Utility Costs Under Work-at-Home Program, 68 Comp. Gen. 502, 505 (1989).*

3. Determinations are fact/agency/purpose specific and made on a case-by-case basis.

4. When new or additional duties are imposed by legislation or Executive Order, and no additional appropriations are provided, the current appropriation may be charged if a sufficient relationship exists. Director, National Science Foundation, *46 Comp. Gen. 604 (1967),* The Honorable Bill Alexander, *63 Comp. Gen. 422 (1984).*

C. EXPENDITURES PROHIBITED BY LAW

1. Constitution.

2. Permanent Legislation.

3. Annual Appropriations Acts.

4. Comptroller General Decisions.

D. EXPENDITURES OTHERWISE PROVIDED FOR

1. A specific appropriation must be used for a particular purpose to the exclusion of a more general appropriation which might otherwise be available. The Honorable Bill Alexander, *63 Comp. Gen. 422 (1984).*

a. General appropriations are not available to augment more specific ones. Secretary of the Navy, *20 Comp. Gen. 272 (1940).*

b. The fact that a specific appropriation is exhausted is immaterial. Secretary of Commerce, *36 Comp. Gen. 386 (1956).*

c. The limitation applies even if a specific appropriation is included in a more general appropriation. Secretary of the Interior, *20 Comp. Gen. 739 (1941).*

2. An agency may choose either of two equally and reasonably available appropriations for an expenditure not specifically mentioned in either. Payment of SES Performance Awards of the Railroad Retirement Board's Office of Inspector General, *68 Comp. Gen. 337 (1989).*

a. Agency discretion is not questioned. Sec. of Agriculture, *18 Comp. Gen. 298 (1938).*

b. Once a selection is made, that appropriation must be

b. Government employees may attend government sponsored meetings as a "necessary expense."

c. Military personnel may attend non-government sponsored meetings with administrative approval. *37 U.S.C. § 412.* Approval is not needed for government meetings. Secretary of the Navy, *50 Comp. Gen. 527 (1971).*

3. Entertainment. Appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by the proper administrative officer. Administrator, Veterans Administration, *43 Comp. Gen. 305 (1963).*

a. Coffee and donuts unauthorized. Department of the Army-Claim of the Hyatt Regency Hotel, *B-230382, December 22, 1989 (unpub.).*

b. Live musical performance exception for agency EEO cultural and ethnic programs. Internal Revenue Service--Live Entertainment and Lunch Expense for National Black History Month, *60 Comp. Gen. 303 (1981).*

c. Fireworks unauthorized. Navy Fireworks Display, *B-205292, 82-2 CPD 1, January 8, 1982.*

d. Refreshments both allowed and not allowed. Refreshments at Awards Ceremony, *65 Comp. Gen. 738 (1986),* Administrator, Veterans Administration, *43 Comp. Gen. 305 (1963), and GSA authorization..*

4. Clothing. Most items of wearing apparel are the personal responsibility of an employee. However, there are three statutes under which purchase of apparel may be authorized: *5 U.S.C. § 7903* (special clothing for hazardous occupations), *5 U.S.C. § 5901* (uniform allowances), and the Occupational Safety and Health Act of 1970 (protective clothing).

a. Safety shoes authorized. Internal Revenue Service--Purchase of Safety Shoes, *67 Comp. Gen. 104 (1987).*

b. Evening clothes for diplomats okay. United States Embassy, London--Rental of Ceremonial Dress, *68 Comp. Gen. 638 (1989).*

5. Decorations. May be purchased as long as they are not for personal convenience or satisfaction.

a. Art work consistent with work-related objects okay.

7. Telephone. Except for long-distance official business calls, installation and charges in a private residence are generally not allowed. *31 U.S.C. § 1348.* Telephone in temporary quarters allowed. Timothy R. Manns--Installation of Telephone Equipment in Employee Residence, *68 Comp. Gen. 307 (1989).*

VI. AUGMENTATION OF APPROPRIATIONS

A. AUGMENTATION GENERALLY INVOLVES EXPENDITURES IN EXCESS OF THE AMOUNT APPROPRIATED FOR A PARTICULAR PURPOSE.

B. AUGMENTATION OF ONE APPROPRIATION BY ANOTHER APPROPRIATION OR BY AN OUTSIDE SOURCE IS PROHIBITED. WILDER v. UNITED STATES, *16 CT. CL. 528 (1880),* Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155 (1957), Administrator, Veterans Administration, 45 Comp. Gen. 255 (1965), Donor Payments to Internal Revenue Service for Employee Meeting Attendance Costs, 55 Comp. Gen. 1293 (1976).

1. Constitution violated by an agency undercutting the congressional "power of the purse" in circuitously exceeding the amount Congress has appropriated for that activity by augmentation. "No money shall be drawn from the Treasury except in consequence of appropriations made by law." *U.S. CONST. Article I, Section 9, Clause 7.*

2. Purpose Statute violated by using one appropriation to pay costs associated with the purposes of another appropriation. *31 U.S.C. § 1301(a).* See also: Nonreimbursable Transfer of Administrative Law Judges, *65 Comp. Gen. 635 (1986),* Department of Health and Human Services--Detail of Office of Community Services Employee, *64 Comp. Gen. 370 (1985).*

3. Miscellaneous Receipts Statute violated by retaining government funds received from source outside of the agency.

a. "Except as...(otherwise provided)...an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim." *31 U.S.C. § 3302(b).*

b. See also: Use of Appropriated Funds by Air Force to Provide Support for Child Care

3. Bond forfeiture proceeds may be retained to extent necessary to cover costs of the United States. *16 U.S.C. § 579c*. See also: USDA Forest Service--Authority to Reimburse General Appropriations With the Proceeds of Forfeited Performance Bond Guarantees, 67 Comp. Gen. 276 (1988), National Park Service--Disposition of Performance Bond Forfeited to Government by Defaulting Contractor*, 64 Comp. Gen. 625 (1985).*

4. Donations to the government are permitted for the United States as a whole but prohibited for individual agencies without statutory authority. The Secretary of Defense may accept gifts but they may not be expended until appropriated. *10 U.S.C. § 2608*.

D. COMPTROLLER GENERAL EXCEPTIONS TO THE PROHIBITION ON AUGMENTATION

1. Replacement contract excess reprocurement costs. Bureau of Prisons--Disposition of Funds Paid in Settlement of Breach of Contract Action*, B-210160, 84-1 CPD 91,* Funding of Replacement Contracts, *68 Comp. Gen. 158 (1988), 88-2 CPD para. 602.*

2. Refund for erroneous payment. International Natural Rubber Organization--Return of United States Contribution, 62 Comp. Gen. 70 (1982), Defense Logistics Agency-- Disposition of Funds Paid in Settlement of Contract Action, *67 Comp. Gen. 129 (1987).*

3. Replacement for property damaged by a third party in lieu of cash. Bureau of Alcohol, Tobacco, and Firearms--Augmentation of Appropriations--Replacement of Autos by Negligent Third Parties, *67 Comp. Gen. 510 (1988).*

4. Funds held in trust for third parties. The Honorable John Dingell, *60 Comp. Gen. 15 (1980).*

5. Certain nonreimbursable details. Department of Health and Human Services--Detail of Office of Community Services Employees*, 64 Comp. Gen. 370 (1985).*

a. To Congress. Detail of Officers and Employees to Congressional Committees, *21 Comp. Gen. 954 (1942).*

b. Between executive branch agencies where similar matters involved. Department of Health and Human Services—Detail of Office of Community Services Employees, *64 Comp. Gen. 370 (1985).*

c. For brief periods when necessary services cannot be obtained by other means and

3. Limitation .0012 -- Miscellaneous Expenses, Category A. For official entertaining at times of national holidays, facilities dedications, and distinguished guest visits, and for purchase of authorized gifts and mementos.

a. Authorized guests are distinguished and prominent citizens who have made a substantial contribution to the Nation or DoD, and dignitaries and officials of local, county, state, Federal, and foreign governments.

b. Rules provide certain ratios of DoD personnel to authorized guests and prohibitions on the use of funds.

4. Limitation .0014 -- Miscellaneous Expenses, Category B. For miscellaneous expenses, other than official representation, not provided for in other appropriations.

COMMUNITY RELATIONS AND PUBLIC AFFAIRS FUNDS

1. Appropriations available for the cost of participating in community relations events.

2. Controlled by: *AR 360-61, Community Relations (15 January 1987).*

Section C: Time

I. CONSTITUTIONAL FOUNDATION

A. *U.S. Constitution, Article I, Section 8, Clause 1* - The power to tax and spend.

B. *U.S. Constitution, Article I, Section 8, Clause 16* - Organizing and training the militia.

C. *U.S. Constitution, Article I, Section 9, Clause 7* - No money spent except as a consequence of a lawful appropriation.

II. STATUTORY FOUNDATION

A. *31 U.S.C. § 1552.* An appropriation is available for obligation for a definite period of time, and it must be obligated during this period of availability. If it is not, the authority to obligate expires.

B. The Annual Appropriations Acts.

C. *31 U.S.C. § 1341(a)(1)(B).* Funds may not be obligated prior to signature of the Appropriations Act and receipt of the funds from the Office of Management and Budget through higher headquarters.

IV. PERIOD OF AVAILABILITY FOR VARIOUS APPROPRIATIONS

A. Operation & Maintenance (O&M) Funds - 1 year.

B. Research, Development, Test & Evaluation (RDT&E) Funds - 2 years.

C. National Guard & Reserve Equipment - 3 years.

D. Procurement Funds - 3 years.

E. Construction - 5 years.

F. Stock and Industrial Funds - Indefinite (No Year).

G. Multi-year - Varies up to Five Years Depending on the Program. **The Defense Department receives a variety of special purpose appropriations, some of which are available for more than one year. For example:**

1. O&M, Humanitarian Assistance -- 2 years; and

2. O&M, Goodwill Games -- 2 years.

V. FUNDING REPLACEMENT CONTRACTS.

A. Policy.

1. There are three important exceptions to the general prohibition on obligating funds after the period of availability.

2. The law in this area is now settled as a result of OSD Comptroller policy changes. The OSD Comptroller on at least one prior occasion directed that reprocurement contracts awarded after a termination for default must be funded with current appropriations. This policy is now rescinded.

B. Protests to GAO.

1. "[F]unds available to an agency for obligation for a contract at the time a protest is filed in connection with . . . award of such a contract shall remain available for obligation for 90 working days after the date on which the final ruling is made on the protest." This authority is limited to protests filed at the GAO or in a court. 31 U.S.C. § 1558.

2. This statutory provision was incorporated at *FAR 33.102(b). 55 Fed. Reg. 55,782 (1990), (Federal Acquisition Circular 90-3).*

C. Terminations for Default.

1. Terminations for Default: If a contract or order is terminated for default, and a bona fide need still exists for the supplies or services, the original funds remain available for obligation for a reprocurement, even if they would otherwise have expired. The reprocurement contract must be entered into without undue delay and must be for

D. Termination for Convenience of the Government.

1. The general rule is that a prior year's funding obligation is extinguished upon termination of a contract for convenience, and funds do not remain available to fund a replacement contract in a subsequent year where a contracting officer terminates a contract for the convenience of the government.

2. An important exception to this rule was adopted by the Comptroller General in Funding of Replacement Contracts, 68 Comp. Gen. 158 (1988), 88-2 CPD para. 602 and Navy, Replacement Contract, 70 Comp. Gen. 230 (1991), 91-1 CPD para. 117. Funds originally obligated in one fiscal year for a contract that is later terminated for convenience in response to a court order or to a determination by the General Accounting Office or other competent authority that the award was improper.

3. This authority was expanded in 1991 to include terminations for convenience resulting from a contracting officer's determination that the award was clearly erroneous.

4. If the original award is determined to be improper and the contract is terminated for convenience, either by the contracting officer or as the result of an order by a judicial body, the funds originally obligated remain available in a subsequent fiscal year to fund a replacement contract, subject to the following conditions:

a. The original award was made in good faith;

b. The agency has a continuing bona fide need for the goods or services involved;

c. The replacement contract is of the same size and scope as the original contract;

d. The replacement contract is executed without undue delay after the original contract is terminated for convenience; and

e. If the termination for convenience is based upon the contracting officer's determination that the original award was improper, the contracting officer must execute a written determination stating the factual and legal basis for the conclusion that the award was improper.

VI. LIMITATIONS BASED UPON THE BONA FIDE NEED RULE.

A. Statutory Basis.

B. Practical Considerations.

1. A bona fide needs inquiry focuses on the timing of the obligation of funds and whether that obligation is for a current need of the government.

2. The needs of the government and the nature of a product or service determine when bona fide need arises.

3. The term "bona fide need" has meaning only in the context of a fiscal law analysis. A bonafide needs analysis is separate and distinct from an analysis of contract specifications and whether or not they are a legitimate expression of the government's minimum needs.

4. Determining the bona fide need for an acquisition requires the application of judgment.

5. Each bona fide need determination is fact-specific.

6. Bona fide need is determined at the time of an obligation of the appropriated funds.

C. Bona Fide Needs Rule Applied to Supply Contracts.

1. Generally, bona fide need is determined by the date the government actually requires the supplies being acquired (i.e., when the government actually will be able to use the items).

2. Accordingly, funds are obligated for the fiscal year in which the supplies will be delivered for use. To Chairman, United States Atomic Energy Commission, 37 Comp. Gen. 155 (1957); To Betty F. Leatherman, Department of Commerce, 44 Comp. Gen. 695 (1965); To Administrator, Small Business Administration, 44 Comp. Gen. 399 (1965), 1965 CPD par. 4.

3. Supply needs of a future fiscal year are the bona fide need of the subsequent fiscal year, unless an exception applies. Two recognized exceptions are: the lead-time exception and the stock level exception.

4. Lead-time exception to the bona fide need rule: It is appropriate to take into consideration the normal production lead-time in determining the bona fide need for an acquisition.

a. For example, if the normal lead-time between order and delivery of an item is 45 days, an obligation of Fiscal Year 2000 funds is appropriate for a delivery on or before 15 November 2000. (Remember 1 October 2000 is the beginning of Fiscal Year 2001.) This is a bona fide need of Fiscal Year 2000. If delivery after 15 November 2000 is permitted,

b. If the government establishes a delivery date for an item and that delivery date is both beyond the normal lead-time and in the next fiscal year, funds for the next fiscal year must be used. In the example above, if delivery is permitted after 15 November 2000, Fiscal Year 2001 funds must be used.

5. Stock level exception to the bona fide need rule: It is also appropriate to purchase sufficient supplies necessary to maintain adequate and normal stock levels.

a. For example, a contract to maintain the normal, authorized stock levels of repair parts may be awarded in September 2000, and requiring delivery in September 2000 using FY 2000 funds, even if it is known that the repair parts will not be used until early Fiscal Year 2001.

b. Current year funds may be used to replace stock consumed in the current fiscal year, even though the replacement stock may not be used until the following fiscal year.

c. Fiscal year-end stockpiling of supplies in excess of normal usage requirements is prohibited.

D. Bona Fide Need Rule Applied to Service Contracts**.**

1. General rule: A bona fide need for services does not arise until the services are rendered. Theodor Arndt GmbH & Co., B-237180, January 17, 1990, 90-1 CPD para. 64; EPA Level of Effort Contracts, *65 Comp. Gen. 154 (1985).* Thus, service contracts generally cannot cross fiscal years and must be funded with dollars available for obligation on the date the services are performed.

2. Nonseverable service exception: If the services produce a single or unified outcome, product, or report, the services may be regarded as being nonseverable. If so, the entire effort may be funded with dollars available for obligation at the time the contract is executed, and the contract may cross fiscal years. Proper Appropriation for Expenses Relating to Nonseverable Service Training Course, B-233242, August 3, 1989; Acumenics Research and Technology, Inc. - Contract Extension, B-224702, August 5, 1987, 87-2 CPD para. 128; Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases, *65 Comp. Gen. 741 (1986).*

3. Statutory exception to the bona fide need rule concerning severable services: Previously, 20 there

F. Bona Fide Need Rule Applied to Maintenance and Repair Contracts**.**

1. Current funds may be obligated for maintenance and repair contracts near the end of the fiscal year, even if performance may not begin until the next fiscal year. ***DFAS 37-1, Table 9-2, fn. 5.***

2. This authority is limited to the following situations:

a. The requirement must represent a bona fide need of the current fiscal year;

b. The contract must contain a specific provision requiring that the work must actually start on or before January 1 of the following calendar year, except in contracts with a foreign government or contracts entered into pursuant to a binding international agreement.

c. Commencement of work is evidenced by:

(1) Physical on-site evidence based upon a visual inspection; or

(2) Documentary evidence of costs incurred must be considered when planning for outdoor construction or renovation projects. A project that cannot reasonably be expected to commence before the onset of winter weather is not the bona fide need of the prior Fiscal Year. For example, a contract for paving 18 kilometers of roads in Fairbanks, Alaska, probably should not be awarded on 30 September 2000 and funded with Fiscal Year 2001 dollars.

d. If mission requirements make it impossible to allow the commencement of the work until 15 December, the requirement is not the bona fide need of the prior fiscal year.

e. Factors within the government's control are most important in determining bona fide need. Cf. Theodor Arndt GmbH & Co., B-237180, January 17, 1990, 90-1 CPD para. 64 (agency decision to wait until Fiscal Year 1990 to award a service contract, with performance commencing on 15 October 1989, is correct where services are not needed until that date). In analyzing the bona fide need for a given item, the following factors are appropriate for consideration:

(1) The required delivery date in the contract;

(2) The normal rate of consumption;

(3) The date when the government is making facilities,

VII. MULTIPLE YEAR FUNDS AND MULTIPLE YEAR CONTRACTS.

A. Introduction.

1. See Hill, The Dollars and "Sense" of Government Contract Funding (American Bar Association, Public Contract Law Section Monograph, 1988), Chapter 2.

2. Multiple Year Funds and Multiple Year Contracts.

a. There is a clear separation between fiscal law and contract law as it relates to multiple year appropriateness. Proper analysis requires that the fiscal law issues be considered separately from the contractual form.

b. The law governing multi-year contracting and contracts containing options is beyond the scope of this course and will not be considered.

B. Basic Concepts.

1. The annual DoD Appropriations Act typically contains the following provision:

"No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year, unless expressly provided herein. *E.g., Pub. L. No. 103- 335, Section 8003, 108 Stat. 2617 (1994)."*

2. Multiple year appropriations are those appropriations which expressly provide that they remain available for obligation for a definite period in excess of one fiscal year. *Title 7, Fiscal Guidance, Chapter 2, Paragraph 2.1.C.1.b., GAO's Policy and Procedures Manual for Guidance of Federal Agencies (Feb. 12, 1990); Section 21.1, Office of Management and Budget Circular A-34, Instructions on Budget Execution (August 1985).*

3. The multiple year appropriations usually provided to the Department of Defense include:

a. O&M, Humanitarian Assistance -- 2 years.

b. O&M, Goodwill Games -- 2 years.

c. National Guard & Reserve Equipment -- 3 years.

d. Procurement Appropriations -- 3 years.

e. Shipbuilding and Conversion, Navy -- 5 years, except that certain obligations may be incurred for longer periods.

f. Research, Development, Test and Evaluation (RDT&E)

C. Statutory Controls.

1. The *Bona Fide Needs Rule, 31 U.S.C. § 1502(a),* applies to multiple year appropriations. Defense Technical Information Center -- Availability of Two Year Appropriations, 68 Comp. Gen. 170 (1989); Chairman, Committee on Appropriations, House of Representatives, *55 Comp. Gen. 768 (1976).* A multiple year appropriation may only be expended for obligations properly incurred during the period of availability. Therefore, the FY 1990 RDT&E, Army Appropriation, which is available for obligation until September 30, 1991, may be obligated for the needs of FY 1990 and FY 1991. It is not available for the needs of FY 1993.

2. The exceptions to the bona fide needs rule relating to acquisitions to maintain stock levels and lead time for special goods also apply. This statutory rule is limited by administrative policies discussed later.

D. Administrative Controls: Program Objectives.

1. Procurement appropriations: Program managers using procurement appropriations want to have all the necessary funding in hand before they obligate funds on a procurement contract. Having all of the funds helps to ensure stable production runs and lower costs.

2. RDT&E appropriation: Program managers using RDT&E want to dribble out funding among various programs, giving more to those programs showing progress and withholding from those programs going nowhere.

3. The managers of procurement appropriations and RDT&E appropriations have diametrically opposed outlooks on funding programs within their purview. These philosophies result in two different funding policies.

E. Full Funding Policy.

1. *DoD Directive 7200.4,* Full Funding of DoD Procurement Programs (Sept. 6, 1983), describes the full funding policy as follows:

> **"At the time of contract award, funds are available to cover the total estimated cost to deliver the contract quantity of complete, militarily usable items. If a future-year appropriation is required for delivery of the end items, the contract is not fully funded. See *AFR 172-1, vol. 1, ch. 8."***

2. The purpose of the full funding policy is to ensure that the amount requested each year will buy a specific quantity of end items. Absent this policy, agencies might conceal the total cost of an end item by splitting

4. Efficient production dictates two general exceptions to full funding policy. *DoD Dir. 7200.4, Full Funding of DoD Procurement Programs (Sept. 6, 1983).*

a. Advanced procurement for long lead-time items allows acquisition of components, material, parts, and effort in an earlier fiscal year than that in which the related end item will be acquired.

b. To be eligible for advanced procurement, long lead-time items must have a significantly longer lead-time than other items. The cost of the advanced procurement items must be relatively small when compared to the remaining costs of the end item. An annual budget request must include at least the estimated termination liability for long lead-time item procurements. The advanced procurement is for one fiscal year's program increment.

c. Advanced economic order quantity (EOQ) procurement for multi-year procurement allows the agency to acquire components, materials, and parts for up to five fiscal years' program increment to obtain the economic advantage of multi-year procurements. The advanced procurement may obligate the termination costs, or the entire cost, if cheaper. EOQ costs may also be included in an unfunded cancellation clause.

d. Full funding and *Title 31 U.S. Code*. The DoD full funding policy is not statutory. Violations of the full funding policy do not violate the Anti-Deficiency Act. Newport News Shipbuilding and Drydock Co., *55 Comp. Gen. 812, 822 (1976); 76-1 CPD para. 136* (option exercise valid, despite violation of full funding policy, because obligation did not exceed available appropriation).

F. Incremental Funding Policy.

1. The Research, Development, Test and Evaluation Program is executed by incrementally funding contracts and other obligations. AR 70-6, Management of the Research, Development, Test, and Evaluation, *Army Appropriation (16 June 1986), para. 2-2; AFR 170-8, para. 8.*

2. The incremental funding policy budgets an amount for each fiscal year sufficient to cover the obligations expected during that fiscal year. Each contract awarded limits the government's obligation to the costs estimated to be incurred during the fiscal year. Funds for succeeding years are obligated during later years.

d. To prevent funding gaps associated with late appropriations, the contracting officer may fund contract performance for 90 days into the next fiscal year with the current year's appropriation. ***AR 70-6, para. 2-2.b.(4).***

4. Incremental Funding, for management purposes, transforms 2 year RDT&E appropriations into 1 year funds. Legally, however, RDT&E appropriations may be obligated during their second year of availability. Frequently, agencies receive permission from the appropriation manager to obligate funds during the second year where problems prevent obligating an annual increment during the first year.

Section D: The Anti-Deficiency Act

I. CONSTITUTIONAL FOUNDATION

A. U.S. Constitution, Article I, Section 8, Clause 1 - The power to tax and spend.

B. U.S. Constitution, Article I, Section 8, Clause 16 - Organizing and training the militia.

C. U.S. Constitution, Article I, Section 9, Clause 7 - No money spent except as a consequence of a lawful appropriation.

II. STATUTORY FOUNDATION

A. 31 U.S.C. §§ 1511 - 1519 (require apportionment and administrative subdivisions of appropriations).

B. 31 U.S.C. § 1341 (prohibits obligations or expenditures in excess of appropriations and contracting in advance of an appropriation).

C. 31 U.S.C. § 1342 (prohibits government employees from accepting voluntary services).

D. 31 U.S.C. § 1344 (prohibits the unofficial use of passenger carriers).

III. REGULATORY FOUNDATION

Note

A. DFAS-IN Regulation 37-100-XX, Army Accounting and Fund Control.

B. National Guard Pamphlet 37-1, Financial Management.

C. Air Force Regulation 177-16.

IV. APPORTIONMENT. 31 U.S.C. §§ 1512 - 1513.

A. Definition. An apportionment is a distribution by the Office of